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UNITED STATES SUPREME COURT

OCTOBER, 1994 TERM

KAREN R. LUNDE,

PETITIONER

vs.

CHARLES M. HELMS, ET AL.,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO "STATEMENT OF THE CASE" AT PAGES 2 THRU 4 OF RESPONDENTS' BRIEF IN OPPOSITION:

Throughout this litigation, counsel for Respondents have, on many occasions, misrepresented the record. The first of such misrepresentations that is set forth in Respondents' Brief in Opposition is in the very first paragraph of its "Statement of the Case," page 2. Here, Respondents claim, falsely, that "This case was originally brought pursuant to . . . Iowa Code chapter 17A, the Iowa Administrative Procedures Act." In fact, as Petitioner stated in her Petition for Certiorari, at page 16, her Complaint in Federal court "did not include any pendent state claims."

Another of such misrepresentations occurs at page 4 of Respondents' Brief in Opposition:

> Petitioner then returned to her Federal action, and on **December 8, 1992**, moved for the recusal of the Honorable Charles R. Wolle. **On the same date, she filed her Amended Complaint** which sought damages and **for the first time, a jury trial.** [Emphasis supplied.]

Along with this Reply to Brief in Opposition, Petitioner is filing three documents in the Office of the Clerk, U. S. Supreme Court.[1] One of these three documents, lodged with the Clerk, is an original, file-stamped copy of the Complaint (Amended) in the instant case,

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[1]The three documents filed as lodgings are: Complaint (Amended), file-stamped Aug. 15, 1989, at 12:46 p.m.; Application for an Appeal in Advance of Final Judgment, showing an Iowa Supreme Court file stamp of Nov. 30, 1990; and a copy of an Order denying the application, without prejudice, by the Iowa Supreme Court, filed Jan. 2, 1991.

clearly showing that it was filed **Aug. 15, 1989, NOT Dec. 8, 1992**, as claimed by counsel for Respondents in the passage quoted above. This difference in dates is very significant. Petitioner filed her Complaint (Amended), requesting a jury trial on damages with reference to the individual Defendants (Respondents here) on Aug. 15, 1989, PRIOR TO the date that Judge Wolle put this case on a stay, of indefinite duration, which date was Aug. 31, 1989. Petitioner further amended her Complaint, with the Court's permission, on Feb. 18, 1993.[2] Res-

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[2]Permission to amend her Complaint to reflect changes which had occurred during the period of three and one-half years while the instant case was on a stay ordered by Judge Wolle was set forth in an **Order of Jan. 26, 1993 by a U. S. Magistrate Judge**, not an order by Judge Wolle.

pondents filed their Answer to Petitioner's Second Amended Complaint on April 5, 1993. In the passage quoted above, Respondents attempt to make it appear that Petitioner did not file her request for a jury trial on damages until Dec. 8, 1992, a date subsequent to the State administrative and judicial proceedings. As noted above, Respondents thus have misrepresented the record, to this Court. This same misrepresentation was made by Respondents to the U. S. Court of Appeals for the Eighth Circuit (in Defendants-Appellees' Brief, page 11) and Petitioner brought this to the attention of the Court of Appeals (in her Reply Brief, at page 4). Nevertheless, this misrepresentation evidently confused the Court of Appeals, which said, in

pertinent part:

> . . . The district court vacated the stay, denied the motion to recuse and granted Lunde leave to file an amended complaint, **adding a Title IX damages claim and a demand for jury trial.** . . . (Emphasis supplied.)

Thus, it appears that the Court of Appeals thought that the damages claim and demand for jury trial were not added until the Complaint was amended **subsequent to** the stay. But the damages claim and jury demand were added **prior to** the stay, and this confusion may very well have been outcome-determinative. In her Petition for Rehearing and Suggestion for Rehearing En Banc filed with the Court of Appeals, Petitioner, at pages 14-15, noted the confusion by the Court as follows:

> Appellant respectfully requests rehearing, by the panel, and if possible, reargument, in order to

> completely replace the decision entered on July 6, 1994. The factual misapprehensions set forth therein are so many in number, and so fundamental in scope, that it would be wise to begin anew. . . .

Another important misrepresentation of the record by the Respondents is this one, at page 3 of their Brief:

> . . . Although the Petitioner asserted a reservation of federal claims for later litigation in federal court, she vigorously litigated all of her federal claims in the Iowa court. On February 25, 1991, through March 4, 1991, **trial was held** . . . [Emphasis supplied.]

There was no "trial" in State court. The so-called "trial" was actually an evidentiary hearing, pursuant to Chapter 17A, Iowa Administrative Procedure Act, which a State court judge conducted as a part of administrative review proceedings, in which Petitioner's participation was coerced and under vigorous protest.[3]

Quoting from Judge Wolle's Rulings and Summary Judgment for Defendants, pp. A-22 through A-50, in the Supp. Appendix to Petition for Writ of Certiorari:

> . . . the court exercised its

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[3] See, Application Pursuant to Rule 2, Iowa Rules of Appellate Procedure, for an Appeal in Advance of Final Judgment from a Decision by The Hon. Robert A. Hutchison, Judge, Fifth Judicial District of Iowa, in the Iowa District Court for Polk County, Appellant's Application, Karen R. Lunde v. State Board of Regents, in the Supreme Court of Iowa, No. 90-1785, filed Nov. 30, 1990, lodged with the Office of the Clerk, U.S. Supreme Court.

discretion

> to stay further proceedings in this court pending the outcome of administrative and State judicial proceedings concerning plaintiff's challenge to her dismissal from medical school.

In the ruling of August 31, 1989, this court made clear that it would lift the stay and hold further proceedings in this action if the plaintiff demonstrated

> that any administrative and judicial proceedings plainly infringe the constitutional rights or federal statutory rights of the plaintiff in respects that the State judiciary cannot or will not address and remedy. [Pages A-25 and A-26.]

Petitioner appealed the stay order; see, Lunde v. Helms, 898 F.2d 1343 (8th Cir. 1990), cert. denied, 498 U.S. 897, 111 S.Ct. 249 (1990). The coercion of Petitioner in the stay order is obvious.

REPLY TO "REASONS FOR DENYING THE WRIT" AT PAGES 5 THRU 10 OF RESPONDENTS' BRIEF IN OPPOSITION:

I. Respondents claim that there are no special and important reasons in this case to grant certiorari to review a judicial recusal decision. Respondents further claim that "Petitioner's issue is neither important nor recurring."

On the contrary, Petitioner would point out the very obvious fact that issues regarding judicial recusal are being raised with increasing frequency. A search of all volumes of Federal Reporter 3rd reveals that the Federal recusal statute, 28 U. S. Code Sec. 455, is mentioned at least once in almost every volume. Moreover, Fifth Amendment, or Fourteenth Amendment, due process is implicated in virtually every case,

because every party is entitled to an impartial judge, as an element of due process. See, 48A C.J.S., Sec. 108, Judges.

Thus, the recusal issues involved here are important, because they have constitutional due process implications, and they are recurring with increasing frequency. And, as illustrated by the confusion among the circuits as to the appropriate standard of review, the instant case will give the Supreme Court a timely opportunity to give guidance to the Courts of Appeal in this increasingly important area: Judicial recusal, and the appropriate standards to be used by the Courts of Appeal in reviewing district court recusal rulings.

II. Respondents claim that the standard of review used by the Court of Appeals in deciding the recusal issue was not determinative of the Court's decision. Petitioner, on the other hand, contends that the standard of review may very well have been outcome-determinative.

Under the obsolete "abuse of discretion" standard used by the Court of Appeals for the Eighth Circuit in the instant case, it is assumed that the Judge has almost complete discretion as to whether or not to recuse himself. This may have been a proper standard prior to "the major changes in prior law effected by the revision of [28 U.S. Code] Sec. 455 in 1974." See, Liteky v. U. S., ___U.S. ____, 114 S.Ct. 1147, 1153, 127 L.Ed.2d

474 (1994), opinion for the Court by Justice Scalia. However, the 1974 changes warrant use of a de novo standard of review. In Liteky, supra, Justice Scalia wrote, in pertinent part:

> Subsection (a), the provision at issue here, was an entirely new "catch-all" recusal provision covering both "interest or relationship" and "bias or prejudice" grounds, see Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)--but requiring them all to be evaluated on an objective basis, so that what matters is not reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever "impartiality might reason-

ably be questioned." [114 S.Ct. 1147, 1153-1154.]

The Liteky opinions reveal a 5-4 split among the Justices of this Court as to whether or not an "extrajudicial" source of bias or prejudice must be shown, with reference to Sec. 455(a). The Court of Appeals did not discuss this point but might have done so, had it been using a de novo standard of review. See, e.g., Matter of Huntington Commons Associates, 21 F.3d 157 (7th Cir. 1994), where the Seventh Circuit applied the Liteky decision that had only been announced the previous month, and obviously did not review for abuse of discretion. Thus, one of the differences that de novo review can make in outcome is that the Court of Appeals can freely apply the

latest Supreme Court decisions in this developing area of the law.

Here, with reference to the instant case, is what the Court of Appeals for the Eighth Circuit **should** have done, in the light of Liteky:

1) The fact that Judge Wolle had been making financial contributions to the Respondents provided the **extrajudicial source** for his bias in favor of Respondents;

2) Some of the **rulings** that Judge Wolle made, evidencing his bias in favor of the Respondents, may be summarized as follows:

a) Petitioner contends that the stay of her Federal case for three and one-half years indicated bias in favor of Respondents. The decision by the Court of Appeals in

Lunde v. Helms, 898 F.2d 1343 (8th Cir. 1990), cert. denied, 498 U. S. 897, 111 S.Ct. 249 (1990) assumed that the stay was only a "temporary suspension" of Petitioner's Federal case.

b) The fact that Judge Wolle would not allow Petitioner to proceed with her Federal court suit until she had totally exhausted all of her State administrative remedies amounted to bias in favor of Respondents, because the U. S. Supreme Court had held that exhaustion of State remedies is not a prerequisite for a 42 U. S. Code Sec. 1983 suit in Federal Court. Patsy v. Board of Regents of State of Fla., 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

c) Judge Wolle's ruling that

Petitioner was precluded from any sort of trial failed to consider the right to a jury trial as guaranteed by the Seventh Amendment, U. S. Constitution; he also failed to take into account Rule 38(a), Federal Rules of Civil Procedure.

d) In his ruling, Judge Wolle obviously ignored the central thrust of the Supreme Court's decision in Lytle v. Household Mfg., Inc., 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990). The Court of Appeals should have compared what Judge Wolle said about the Lytle case, see Supp. Appendix to Petition for Writ of Certiorari, page A-47, with what the Supreme Court said:

> . . . concern about judicial economy . . . remains an insufficient basis for departing from our longstand-

ing commitment to preserving a litigant's right to a jury trial. [Opinion by Justice Marshall for a unanimous Court.]

e) Judge Wolle ignored the Petitioner's reservation of her Federal suit for the Federal forum, pursuant to England v. Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); he made no mention of this case, nor of its impact on the instant case, despite it being cited many times by Petitioner.

f) Judge Wolle also indicated in his ruling that he had prejudged the merits of Petitioner's jury case. Judge Wolle characterized Petitioner's First Amendment claims as "frivolous" [A-37] and "spurious" [A-39]. Conclu-

ding, he revealed his belief that university officials should make academic and retention decisions, thus implying a belief that the court should not interfere. [A-49, A-50.]

The foregoing views expressed by Judge Wolle respecting the merits of Petitioner's case "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." See, Liteky v. U.S., 114 S.Ct. 1147, 1157 (1994), opinion for the Court by Justice Scalia.

Clearly, there was ample justification for Petitioner's recusal motion. Petitioner urges that the standard of review used by the Court of Appeals may have been outcome-determinative. This Court is amply justified in granting certiorari to resolve the conflict.

III. Respondents claim that Petitioner "unreservedly" litigated her Federal claims in State Court, and that the decision to "deny her request to start over again with a jury trial was correct." In making this claim, Respondents are misrepresenting the record.

Contrary to Respondents' claim, Petitioner did nothing to forego her right to return to the Federal court. Petitioner did only what the Federal court, in its stay order of August 31, 1989, required as a prerequisite for returning to Federal court.

Respondents contend that Petitioner "attempted" to reserve her rights to return to the Federal court, pursuant to England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964) but then "vig-

orously" asserted her Federal claims in the State administrative and judicial review proceedings.

The Supreme Court, in the England case, said:

> When the reservation has been made . . . his [the litigant's] right to return will **in all events** be preserved. [375 U.S. 411, 421-422, 84 S.Ct. 461, 468 (1964), emphasis supplied.]

Since Petitioner in fact reserved her right to return to the Federal court, she did all she needed to do in order to preserve her right to return. Judge Wolle's summary judgment ruling should have been reversed.[4]

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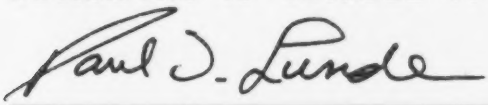
[4]Petitioner cited the England case on five different pages of her Brief to the Court of Appeals and on four different pages of her Reply Brief. The Court of Appeals made no mention of England.

SIGNATURE OF COUNSEL OF RECORD:



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